

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1292 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO
1 & 2 - Yes, 3 to 5 - No

GOYAL M G GASES LTD

Versus

STATE OF GUJARAT

Appearance:

MR NAVIN K PAHWA for Petitioner

GOVERNMENT PLEADER for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 02/12/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner has challenged the notification dated 8.12.1998 issued by the Government of Gujarat in the Labour & Employment Department under Section 3 of the Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as "the Act" or "the BRU Act"). When the petition reached hearing, the petitioner also moved an amendment seeking further relief that the respondent-State Government may

be restrained from issuing any further notification under the aforesaid Act in favour of respondent No.3-Company.

2. The facts leading to filing of this petition, briefly stated, are as under :-

2.1 Respondent No. 3 Company Hamco Mining & Smelting Ltd. borrowed a sum of Rs.2.5 Crores as intercorporate deposit from the petitioner herein. Respondent No.3 issued post dated cheque dated 16.7.1998 for an amount of Rs.1.50 Crores and another cheque dated 21.0.1998 for an amount of Rs.1 Crore drawn on different International Banks having their branches in Mumbai. However, when the cheques were presented on the due dates, the same were dishonoured by the concerned banks. After service of statutory notice under Section 433 and 434 of the Companies Act, 1956, the petitioner, therefore, filed Company Petition No. 214/98 before this Court praying that respondent No. 3 Company be ordered to be wound up as respondent No. 3 Company was unable to pay its debts.

2.2 This Court issued notice on the said Company Petition and made it returnable on 19.11.1998. At the request made on behalf of respondent No. 3 Company, hearing of the Company Petition was adjourned to 10.12.1998 for filing affidavit in reply. On that date respondent No. 3 Company placed on record of the said proceedings the impugned notification dated 8.12.1998 which reads as under :-

" Notification
Government of India
Labour and Employment Department
Sachivalaya, Gandhinagar
Dated the 8th December 1998

No. GH-R-211-BRU-1098-3948/M(3): In exercise of the powers conferred by section 3 of the Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to on "the said Act"), the Government of Gujarat hereby declare that Hamco Mining And Smelting Ltd., 29, GIDC Industrial Area, Umbergaon, District Valsad shall be conducted to serve as measures of unemployment relief and the said undertaking shall accordingly be deemed to be a relief undertaking for a period of one year commencing from the 8/12/1998 for the purpose of the said Act and in exercise of the powers conferred by sub-clause (iv) of clause (a)

of sub-section(1) of section 4 of the said Act, the Government of Gujarat is also pleased to direct that in relation to the said undertaking viz. Hamco Mining and Smelting Ltd. all rights, privileges, obligations, liabilities occurred or incurred before the said undertaking is declare to be a relief undertaking any remedy for the enforcement thereof shall be suspended and all proceedings relating thereto pending before any Court/Tribunal/Officer/Authority shall be stayed for a period of one year commencing from the 8/12/1998 from which the said undertaking under section 3 of the said Act.

By order and in the name of the Governor
of Gujarat,

Sd/-
(Mohan Chavada)
Section Officer
Labour and Employment Department"

2.3 In view of the provisions of Section 4 of the BRU Act, hearing of the Company Petition for winding up could not proceed and the petitioner filed the present petition in February, 1999 for challenging the aforesaid notification dated 8.12.1998 (Annexure "B" to the present petition).

3. The notification dated 8.12.1998 (Annexure "B") has been challenged in the petition on the following grounds :-

- (i) The provisions of Section 3 of the BRU Act were not applicable to respondent No. 3 Company. Under the said provisions an industrial undertaking could be declared as a relief undertaking by the State Government only when the undertaking was started, acquired or otherwise taken over by the State Government or to an industrial undertaking to which any loan, guarantee or other financial assistance has been provided by the State Government. None of these conditions was satisfied in the instant case.
- (ii) The impugned notification does not specify any reason justifying the declaration of respondent No. 3 Company as a relief undertaking.
- (iii) No hearing is given to the persons affected

including the petitioner who have lent huge amounts to respondent No.3 Company.

In support of the second part of the first contention, it is asserted by the petitioner that in the years 1986 and 1988, respondent No.3 Company had obtained some loan from GIIC. However, the loans were repaid in the year 1995. Respondent No. 3 Company had also taken a loan from GSFC in 1986 which was also repaid in 1995 and that there was no loan outstanding either from the GIIC or the GSFC to respondent No. 3 Company. A copy of the search report made by the Company Secretary of Ravi Kapoor & Associates, on behalf of the petitioner has been produced at Annexure "C" to the petition. It is, therefore, submitted that the condition precedent for exercising the powers under Section 3 of the Act was not fulfilled in the instant case.

4. In response to the notice issued by this Court, affidavit in reply dated 28.7.1999 came to be filed by Smt. S.K. Patel, Under Secretary, Labour & Employment Department of the Government of Gujarat. The following averments are made in the said affidavit :-

"I state & submits that Gujarat State Financial Corporation has extended bill discounting facilities to the Unit. Therefore, in this sense, the respondent No. 3 Company has been financially assisted by GSFC. Further, I state & submit that as per the aforesaid provision as a preventive measure to prevent unemployment and to safeguard the interest of the workmen, the said unit is declared as a relief undertaking under Section 3(1) of the said Act.

(5) I further state and submit that Hamco Mining and Smelting Ltd. is situated in Umber Gaon, District Valsad. In the said industry there are total 1,070 workmen are working. There is no union of the workmen and no industrial dispute has been taken place in the said industry. Further, there is no outstanding from the workmen. The said industry has made an application to declare it as a Relief Undertaking. At present, the said industry is incurring loss and the said loss has been occurred due to uncontrollable circumstances. During the current financial year the industry has reduced the salaries and emoluments of the higher officers, including directors. Further, they have curtailed their daily expenses also.

Looking to the aforesaid facts and circumstances of the case, as a preventive measure to prevent unemployment and to safeguard the interest of the workmen, the said industry is declared as a Relief Undertaking under section 3(1) of the said Act.

(6) I state and submit that it is very clear from the notification which is under challenge that the said industry is declared as a Relief Undertaking to serve as a measure of preventing unemployment and, therefore, the impugned notification is legal and justified as the said Company fulfills the eligibility criteria of section 3 of the Act."

5. Affidavit in reply dated 10.6.1999 also came to be filed by B.M. Patel, Managing Director of respondent No.3 Company. It was asserted in the said reply affidavit that the Company was the recipient of the export awards for the years 1990-91 to 1995-96 from the Engineering Export Promotion Council in the category of prime metal ferrous and non-ferrous exporters. The Company had also received "TUV CERT" certificate recognizing the Company's quality system for production of aluminium, tin, lead metal and their alloys and that the Company had also entered into mining operations; that the Company had achieved the turnover of Rs.372.52 Crores in the year ended 31.3.1998 (provisional); that on account of the recessionary trend throughout the world, it became difficult for the Company to realize timely payments from the various customers to whom the Company had sold its products which ultimately reflected in the marginal slide in production activity; that fall in the prices for aluminium, currency devaluation, cut throat competition from various small scale manufacturers, delay in the commissioning of mining projects brought a situation beyond the control of respondent No. 3 Company and that it was in view of the aforesaid financial crunch and in order to avoid unemployment that respondent No. 3 made an application to the State government to grant the protection under the BRU Act. As regards the grant of loan, it was stated in the reply affidavit that the GSFC had granted loan to the Company and a copy of the sanction letter dated 24.7.1997 issued by the GSFC offering facility of bill discounting upto Rs.240 lacs subject to certain terms and conditions was produced at Annexure"I" to the reply affidavit.

5A. Affidavit in rejoinder dated 28.6.1999 is filed

on behalf of the petitioner controverting the averments made in the reply affidavits.

6. At the hearing of the petition today, the learned counsel for the parties have reiterated the contentions urged in their respective pleadings and have made detailed submissions indicated hereinafter.

CONTENTION I

7. Although respondent No. 3 has produced the letter dated 24.7.1997 from the GSFC (Annexure "I"), all that it mentions is that the GSFC had offered a facility of bill discounting upto Rs.240 lacs subject to certain terms and conditions. Condition No. 1 is that the Company shall execute the agreement in prescribed form before any payment is made. The facility was required to be guaranteed by B.M. Patel, Director of the Company. Various other terms and conditions were prescribed. There is nothing on record to show that any of these conditions was fulfilled. No agreement in prescribed form is produced nor guarantee of B.M. Patel in favour of GSFC is produced, nor is there any averment about disbursement of any loan by the GSFC in favour of respondent No. 3 pursuant to sanction letter dated 24.7.1997. Hence, mere issuance of sanction letter by the GSFC did not amount to any loan having been advanced by the GSFC to respondent No.3-Company. The condition precedent for exercise of the power under Section 3(1) of the Act was, therefore, not fulfilled.

CONTENTION II

8. Even assuming that the condition precedent for issuance of notification under Section 3(1) of the Act was satisfied, the object underlying the Act was to grant relief to a company to prevent unemployment or to give unemployment relief. Hence, the protection granted by the notification under Section 3 of the Act is conditional upon the Company continuing to employ the workers for whose benefit the notification has been issued and upon the company continuing to pay their wages as and when they fall due. In spite of the averments made in the petition through draft amendment as far back as on 21.9.1999 stating in terms that as per the news reports, the plant of respondent No. 3 Company is not functioning and the unit is closed and, therefore, the alleged object of issuing the notification as relief undertaking does not exist any longer, these averments or any of the statements made in the report in Business India dated July 26 and August 8, 1999 produced along with the draft

amendment are not controverted. There is no affidavit filed either on behalf of the Government of Gujarat, Labour and Welfare Department or on behalf of respondent No. 3 Company to contradict the case alleged by the petitioner that the manufacturing plant of the company has stopped functioning and that the unit is closed.

9. Looking to the preamble of the BRU Act and the provisions of Section 3 of the said Act it is abundantly clear that the power under Section 3 of the said Act can be exercised only to ensure that the Industrial Undertaking in question will be conducted to serve as a measure of preventing unemployment or as a measure of unemployment relief. In this connection, it would be advantageous to refer to the following observations made by a Division Bench of this Court in M/s. D.S. Patel & Co. vs. Gujarat State Textile Corporation Ltd. & Ors., (1972) 32 GLR 33 :-

"The Bombay Relief Undertaking (Special Provisions) Act, is enacted by the State Legislature with the dominant object of preventing unemployment and of providing relief against unemployment. Even the provisions of sec. 4 of the Act are made to subserve the main purpose of the Act, namely, prevention of unemployment, but as embodied in the long title and preamble, there are ample safeguards to see that the authorised controller carries out the object of preventing unemployment. Therefore, the idea of preventing unemployment cannot be said to be incidental. It is the main object which determines the true nature and character of the legislation."

In the aforesaid case before the Division Bench, the provisions of Section 4 of the BRU Act conferring power on the Government to suspend the rights and liabilities relating to the relief undertaking in question were challenged on the ground that they were violative of Article 19(1)(f) of the Constitution. This Court repelled that challenge on the ground that the restrictions in question are referable to Article 41 of the Constitution and, therefore, the restrictions are reasonable. Article 41 of the Constitution reads as under :-

"41. Right to work, to education and to public assistant in certain cases - The State shall, within the limits of its economic capacity and

development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

Similarly, in *Inderjit C. Parekh vs. V.K. Bhatt*, AIR 1974 SC 1183 = (1974) 15 GLR 573, the Supreme Court has observed that the provisions of the BRU Act are aimed at resurrecting and rehabilitating industrial undertakings brought by inefficiency or mismanagement to the brink of dissolution, posing thereby the grave threat of unemployment of industrial workers. 'Relief Undertaking' means under sec. 2(2) an industrial undertaking in respect of which a declaration under sec. 3 is in force. By sec. 3, power is conferred on the State Government to declare an industrial undertaking as a relief undertaking, "as a measure of preventing unemployment or of unemployment relief." Relief undertakings, so long as they continue as such, are given immunity from legal actions so as to render their working smooth and effective. Such undertakings can be run more effectively as a measure of unemployment relief, if the conduct of their affairs is unhampered by legal proceeding or the threat of such proceedings.

In view of the aforesaid settled legal position, it follows that the moment the industrial undertaking in question stops employing workers or stops paying wages to the workers, the very purpose of issuing Notification under Section 3 of the Act comes to an end and the Industrial Undertaking cannot be allowed to take advantage of the protection conferred by Section 4 of the BRU Act. The provisions of Section 3 of the said Act must, therefore, be read to mean that the Industrial Undertaking getting the benefit of declaration under Section 3 of the Act is duty bound to continue to satisfy the Government that on account of the declaration under Section 3 of BRU Act and notification under Section 4 of the said Act, unemployment has been prevented or it has come as a measure of unemployment relief and the workers continue to be paid their wages regularly. This exercise has also to be undertaken while considering the question whether the declaration made under sub-section (1) of Section 3 of the BRU Act should be renewed for any further period under sub-section (2) thereof. If such an exercise is not undertaken either by the Industrial Undertaking during operation of the declaration or if the State Government is not satisfied at the time of renewal that the purpose of issuing declaration under sub-section (1) of Section 3 was achieved during operation of the

declaration, the power of renewal cannot be exercised under sub-section (2) of Section 3 of the Act.

10. In the facts and circumstances of the present case, the ostensible purpose of obtaining declaration under Section 3(1) of the BRU Act could only have been to ensure that the benefit of declaration was given to the persons entitled to get the same i.e. the workers. Looking to the facts and circumstances of the case particularly the facts brought on record including the report dated June 26/August 8, 1999 in Business India, it appears that the factory of respondent No. 3 is closed and respondent No. 3 and its group Companies owe about Rs.395 Crores to various banks and financial institutions as per the particulars given in the aforesaid report, the relevant extract whereof reads as follows :-

How much Hamco group owes banks ?

Estimated amount
(Rs crore)

Canara Bank	150
State Bank of India	70
IndusInd	45
Federal Bank	45
Vijaya Bank	35
United Western Bank	35
State Bank Commercial International	15

(Besides this there are other fund based activities where banks and FIs have funded the group.)

Once the petitioner herein filed Company Petition No. 214/98, respondent No. 3 appears to have become conscious of the fate that it was likely to meet and, therefore, it rushed to the Government of Gujarat and obtained the declaration dated 8.12.1998 under challenge, but it was never serious in paying wages to its workers or to give them any unemployment relief. After 8.12.1998, respondent No. 3 does not appear to have informed the Government as to how the object of obtaining the declaration under Section 3 of the BRU Act was achieved.

CONTENTION III

11. Apart from the aforesaid aspects, Mr Pahwa has also challenged the impugned notification on the ground of breach of the audi alteram partem rule. Mr Thakore has sought to meet with this contention by urging that the power under sub-section (1) or sub-section (2) of Section 3 is an administrative power and, therefore, the principles of natural justice can never apply to such cases.

The submission that principles of natural justice can never apply to exercise of administrative power must be rejected in view of the Constitution Bench decision of the Apex Court in A.K. Kraipak vs. Union of India, AIR 1970 Sc 150, wherein Their Lordships laid down the following principles :-

"Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice there is no reason why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry.

The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was

necessary for a just decision on the facts of that case."

It is an admitted fact that the declaration under Section 3(1) of the BRU Act in favour of respondent No. 3 was issued without giving any other party any opportunity of being heard.

12. When the declaration under Section 3 of BRU Act to be followed by a notification under Section 4 of the said Act is going to have serious impact on the civil rights of all the creditors and other persons concerned with the Company and their right/s to recover their legitimate dues are going to be suspended by virtue of notification under Section 4 of the Act, the principles of natural justice must be read into the provisions of Section 3 and Section 4 of the Act. Even if individual notices may not be required to be issued to all the individual creditors, at least a public notice must be issued in two daily newspapers having wide circulation in the State where the registered office of the Companies is situate so that all the persons likely to be affected by issuance of the declaration under Section 3 and notification under Section 4 can present their views before the State Government makes such a declaration under Section 3 and issues such a notification under Section 4. Admittedly in the facts and circumstances of the present case, no such public notice was issued. On this ground also, the impugned notification dated 8.12.1988 was vitiated by a serious legal infirmity.

RELIEFS TO BE GRANTED

13. Notwithstanding the aforesaid three serious infirmities vitiating the impugned notification, this Court does not propose to declare the said notification dated 8.12.1998 as illegal or null and void for the following reasons :-

- (i) Striking down the notification as illegal may have serious adverse consequences on the creditors. This is because by virtue of the proviso to sub-section (1) of Section 4 of the BRU Act the period during which the notification under Section 4(1)(a)(iv) is to operate is to be excluded for the purpose of computing the period of limitation. Striking down the notification at this stage when the period of notification is about to expire very soon would curtail the period of limitation for the Creditors by almost one year.

(ii) When the period of Notification is about to expire after about 5 days, the interests of the creditors can be adequately protected by directing the State Government not to renew the declaration under Section 3(1) of the BRU Act without taking into consideration all the relevant aspects pointed out in this judgement and without issuing public notice before exercising the powers under Sections 3 and 4 of the BRU Act.

O R D E R

14. In the result, the petition is partly allowed. Respondent No. 1 is directed not to consider any application which may be made by the respondent No. 3 for declaration under Section 3 of the BRU Act or for notification under Section 4 of the BRU Act without issuing public notice in two daily newspapers having wide circulation in the State of Gujarat and without taking into consideration the principles laid down in this judgement and without imposing the conditions so as to achieve the object of the BRU Act.

December 2, 1999 (M.S. SHAH,J)